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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92053298
Party	Plaintiff Tyler Perry Studios, LLC
Correspondence Address	VICTOR K SAPPHIRE CONNOLLY BOVE LODGE & HUTZ LLP 333 S GRAND AVENUE, SUITE 2300 LOS ANGELES, CA 90071 UNITED STATES
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Attachments	WHAT WOULD JESUS Oppo to Motion TO EXTEND.pdf(100676 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the matter of Trademark Registration No. 3,748,123
Mark: WHAT WOULD JESUS DO
Registration date: February 16, 2010

Tyler Perry Studios, LLC	:	
	:	
Petitioner,	:	
	:	
v.	:	Cancellation No. 92053298
	:	
Kimberly Kearney	:	
	:	
Respondent.	:	

OPPOSITION TO MOTION FOR EXTENSION OF TIME
FOR DEFENDANT'S TRIAL PERIOD

On August 13, 2013, one week before the end of her Testimony Period and over one month after receiving the Board's revised Scheduling Order, Registrant filed a Motion for Extension of Time for Defendant's Trial Period (the "Motion") seeking an inappropriate extension of 90 days to her 30 day testimony period, for a total of 120 days' testimony, or one third of a year.

Registrant claims she needs additional time so that she may seek the testimony of Petitioner's president and owner, under the ruse that he has knowledge specific to this case. This preposterous claim is laid bare by the rest of the record, which shows Registrant's consistent inexcusable neglect of these proceedings and her lack of engagement culminating in her implicit admission through this motion and the testimony period generally that an adverse party witness

purportedly knows more about her alleged use of her registered mark at the time she filed her Statement of Use than she does, even though the Statement of Use was filed by her, in her own name. In the absence of any other defense of the case, the Motion should be denied.

REGISTRANT SHOULD NOT BE REWARDED FOR HER LACK OF DILIGENCE.

Even though all evidence supporting a showing of legitimate use of the mark in connection with the identified services in the registration is within the sole and exclusive control of Registrant, she has not produced any evidence or testimony whatsoever refuting Petitioner's claims in this proceeding -- not in the nearly three weeks prior to her filing this motion, nor in the several days afterwards. She had the entire Testimony Period within which to do so and produced nothing, and yet now she seeks three additional months' delay within which to take a fishing expedition among Petitioner's officers, seeking testimony and "supporting evidence that my [sic] be discovered as a result of the depositions." Registrant's Motion, para. 6. Essentially, she is again seeking to deceitfully reopen discovery even though her earlier attempt to do so was conclusively denied only weeks beforehand. *See* TTAB Order dated June 27, 2013.

THE MOTION FAILS TO ALLEGE GOOD CAUSE AND SHOULD BE DENIED.

Registrant has not shown good cause for any extension of time of her Testimony Period. The Motion is bereft of any factual detail explaining why she has failed to follow procedure and issue subpoenas for the taking of testimony during the three weeks prior to the Testimony or the 30 days during same. *Fairline Boats PLC v. New Howmar Boats Corp.*, 59 USPQ2d 1479 (TTAB 2000) ("Besides [movant's] failure to provide detailed information regarding the apparent difficulty in identifying and scheduling its witnesses, the record is devoid of any explanation as to why [movant] waited until the day before its testimony period closed to request the

extension."). Here, although she waited until six weeks after the Board handed down the revised Scheduling Order on June 27, she had not even bothered serving subpoenas on proposed witnesses as of the time of filing the Motion, and did not do so during the entire Testimony Period. With regard to her desire to seek testimony from Mr. Perry, she did not propose any time or location, nor did she apparently have any plan to travel to Atlanta, where Petitioner's offices are located, to take the testimonial deposition she seeks, demonstrating the lack of seriousness with which she approached the issue she is now seeking to extend. Petitioner likewise filed no Notices of Reliance or other testimonial evidence during the allotted period and should thus not be afforded the luxury and unfair advantage of now further delaying the proceedings through an extended speculative and frivolous exercise.

Likewise, Registrant's attempt to seek discovery through its testimony period is also inappropriate and insufficient basis for granting the Motion. Registrant failed to seek discovery of Petitioner during the discovery period, and should not be rewarded for her dilatory failure by being allowed to do so now. Purported deficiencies in the evidentiary record do not constitute good cause for an extension of the testimony period. *Societa Per Azioni Chianti Ruffino Esportazione Vinicola Toscana v. Colli Spolentini Spletoducale SCRL*, 59 USPQ2d 1383 (TTAB 2001) (Opposer's motion to extend its testimony period to "formally deal" with purported deficiencies in applicant's discovery responses denied because "[a]ny such deficiencies . . . should have been addressed by the timely filing of a properly supported motion to compel discovery prior to the commencement of opposer's testimony period."), *limited extension granted on other grounds*. Here, Registrant's conduct during discovery was found to be the result of inexcusable neglect. *See* Order of June 27, 2013. She is thus not entitled to use the Testimony

Period as a proto-discovery to cover for her failure to timely participate in the discovery period, and no basis exists, nor has one been alleged, for the Board to allow discovery to reopen at this time.

REGISTRANT'S USE OF THE "PRO SE" EXCUSE FALLS FLAT.

Registrant's protestations that she is not represented by counsel again fail to justify her egregious conduct, since she was several times sternly admonished by the Board to retain counsel, most recently at length in the June 27 Order, and she has routinely represented to Petitioner's counsel and the Board that she has a "legal team". *See discussion at* Docket No. 21: Petitioner's Response/Opposition to Motion to Amend Admissions. In fact, in her August 7, 2013 email to Petitioner's counsel, she persists in again referring to herself in plural, reinforcing the implication that she has a "team" of advisors and is not, as she represents to the Board, a sole individual. *See* Exhibits to Registrant's Motion ("**We** would hope it is not his or your intention to delay, or to obtruct....") *emphasis added*. This is consistent with the pattern identified in Petitioner's Opposition brief (*See* Docket No. 21), whereby Registrant represents that she has a "legal team" (and even once had an attorney contact and discuss the case and settlement with Petitioner's counsel on her behalf) but, after failing to follow the rules in the proceeding begs the mercy of the Board by alleging she is a sole individual. She has had it both ways throughout the nearly three years' duration of this proceeding, and the resulting delays in adjudication of the proceeding have caused and continue to cause Petitioner egregious prejudice. Petitioner's plans for use of the subject mark of its own application, which has been blocked by Registrant's evidently bogus registration, have been put on indefinite hold on account of these meandering proceedings. Registrant's failure to otherwise engage in the proceeding speaks for itself, most

resoundingly in her failure to appear in any form during her Testimony Period, while filing a Motion that gratuitously smears an officer of Petitioner at the same time it purports that he knows more about her own use of the mark than she does. This nonsense is not good cause, and should not be further rewarded by the Board.

Moreover, Registrant has failed even to attempt an explanation why she waited six weeks after the Board's admonishing June 27 Order and longer than halfway through her Testimony Period before "realizing" she needs to retain counsel, even while representing to Petitioner less than a week before filing the Motion that she has a multi-person organization representing her interests in this proceeding. Registrant again appears to be seeking further delay in order to extort a nuisance payment from Petitioner in reward for her illegitimate obstinacy. Petitioner respectfully submits that enough is enough, and the Motion should be denied.

TYLER PERRY IS NOT AN APPROPRIATE WITNESS

Registrant claims an entitlement to depose Mr. Perry, when in fact he has no specific or other knowledge of any facts relevant to the registration at issue in this proceeding. Registrant has not attempted to demonstrate any basis to believe Mr. Perry possesses such knowledge, so his is an inappropriate witness. This is particularly so in light of the fact that it is Tyler Perry Studios, LLC, and not Mr. Perry the individual, that has brought this proceeding. Registrant's intention to depose Mr. Perry must therefore be seen for what it is, namely, a vexatious exercise in harassment designed to obtain for her an in-person "pitch meeting" for her never-realized idea for a television show that she has been unable to obtain through ordinary business channels. As such, Petitioner stands by its characterization of the proposed deposition as harassment and inappropriate, for without any evidentiary support for her claim that he has unique and personal

knowledge of any facts relevant to the proceedings (and none are in evidence), Petitioner would have selected an appropriate designee had it been timely and properly subpoena'd by Registrant. However, Registrant, through her neglect and failure to follow the admonitions of the Board and the procedural rules set forth in the TBMP, has not demonstrated good cause, nor has she shown she would be prejudiced by the denial of an extension. Her failure to produce any evidence at all during her Testimonial Period is alone sufficient to deny the Motion.

REGISTRANT'S DISCUSSION OF PURPORTED OTHER WITNESSES IS INAPPOSITE TO THE BASIS FOR SEEKING EXTENSION

Registrant's remarks about alleged other witnesses and their reactions to her invitation to testify are self-serving hearsay unsupported by any evidence, and should be discarded. The Registrant's *modus operandi* is by now familiar throughout her pleadings in these proceedings: use unsupported statements and innuendo of unnamed "others" to malign and smear Petitioner and its principal officer, Mr. Perry, all for the purpose of prejudicing the Board and gaining advantage and sympathy. Again, Registrant's ploy should no longer be rewarded. Her failure to otherwise defend her registration than by relying on Mr. Perry's hoped-for testimony, when if the mark was in use and the registration legitimate, she would have been able to file ample evidence and personal testimony aside from her reliance on third-party witnesses, is telling of the lack of supporting evidence. She claims she had witnesses lined up at the beginning of the Testimony Period; however, she never advised Petitioner's counsel of any planned Testimonial depositions of those witnesses. Quite plainly, she has -- and there is --nothing in support of her fraudulently-obtained registration, and the proceedings should be allowed to advance to the rebuttal and briefing stages so that it may be concluded without further delay.

Petitioner and its officers would be adverse-party witnesses if called by Registrant. None of them could conceivably provide any supportive testimonial evidence for Registrant's claim that the registered mark was in use in connection with the services identified in the registration. On the other hand, if anyone had evidence to refute Petitioner, Registrant did. Her failure to even attempt to timely present any evidence supports the conclusion that no legitimate evidence of use exists. This proceeding should not be extended -- and certainly not for an 90 additional days -- just so Registrant may thus obtain the "pitch meeting" with Petitioner that has not heretofore occurred. Nonetheless, if the Board is inclined to extend these proceedings, the extension should be less than 30 days, as Registrant has already been accorded ample time to make her case and has utterly failed to do so. For this reason, Petitioner again submits that any extension is inappropriate.

REGISTRANT'S JULY 19 EMAIL WAS NEVER TRANSMITTED AND WAS CREATED TO PROVIDE COVER FOR HER FAILURE TO ACT SOONER

Registrant claims to have sent an email to Petitioner's counsel on July 19, 2013. The exhibit in her Motion shows the email was not addressed to the email address of record in these proceedings but rather to an "@novakkdruce.com" address. Upon receipt of the copy of the July message, which Petitioner's counsel requested on August 9, Petitioner's counsel sent a "ping" to the address, which came back two days later as undeliverable. This means that as of July 21, the beginning of her Testimony Period, Registrant would have known that Petitioner did not receive the email she purportedly sent. With that knowledge, she nonetheless waited until August 7, nearly three weeks later, before informally contacting Petitioner's counsel to discuss the

possibility of deposition of Mr. Perry. This inexcusable delay flies in the face of any claim of good cause.

CONCLUSION

In light of the foregoing showing of the egregiousness of Registrant's inexcusable neglect and abject lack of good cause for extension, it would be improper and highly prejudicial to grant the instant Motion. Therefore, the Motion should be denied and dates should remain as set. Alternatively, the Board should sanction Registrant for its inexcusable misconduct of failing to even put on a gossamer defense by granting default against her and canceling the registration forthwith.

Respectfully submitted,
TYLER PERRY STUDIOS, LLC

Dated August 27, 2013

_____/s/_____
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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of August 2013 true and correct copies of the OPPOSER'S OPPOSITION TO REGISTRANT'S MOTION FOR EXTENSION OF TIME FOR DEFENDANT'S TRIAL PERIOD and DECLARATION OF VICTOR SAPPHIRE were served on Respondent Kimberly Kearney, Hollywood South LLC, 17216 Saticoy Street, Suite 235, Van Nuys, California 91406, via first class mail.

/s/

Victor K. Sapphire